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No. 91-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF GEORGIA,

Petitioner,

—against—

THOMAS MCCOLLUM, WILLIAM JOSEPH MCCOLLUM, and ELLA HAMPTON MCCOLLUM,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

AMICUS CURIAE BRIEF FOR CHARLES J. HYNES, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK IN SUPPORT OF PETITIONER

CHARLES J. HYNES
District Attorney

JAY M. COHEN
Assistant District Attorney
Counsel of Record

MATTHEW S. GREENBERG
VICTOR BARALL
CAROL TEAGUE SCHWARTZKOPF
MARGARET ANTINORI
Assistant District Attorneys

Kings County District Attorney's Office
210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2156

Counsel for Amicus Curiae

December 19, 1991

QUESTION PRESENTED

Whether the United States Constitution prohibits a criminal defendant from exercising his peremptory strikes in a racially discriminatory manner.

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AUTHORITY TO FILE BRIEF AMICUS CURIAE

Charles J. Hynes, District Attorney of Kings County, New York, files this brief *amicus curiae* with the consent of the attorneys for the petitioner and the respondent, pursuant to Rule 36.2. Moreover, he is the authorized law officer of a political subdivision of a state, and therefore also files this brief *amicus curiae* pursuant to Rule 36.4.

STATEMENT OF INTEREST OF AMICUS CURIAE

Charles J. Hynes is the District Attorney of Kings County, New York. On March 29, 1990, the New York Court of Appeals ruled that criminal defendants in New York would no longer be able to exercise peremptory challenges on the basis of race. *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647, *cert. denied*, 111 S.Ct. 77 (1990). *Amicus*, as the Special State Prosecutor for the Howard Beach Incident, tried the *Kern* case in 1988 and was one of the first prosecutors in the state of New York to obtain a ruling from a trial court that applied this Court's *Batson* prohibition to criminal defendants.

Like many cases in which criminal defendants seek to strike all members of a particular racial group from the jury, the *Kern* case involved a racial assault. In that case, a mob of eleven young white men attacked three African-American men whose car had broken down near the Howard Beach section of Queens, New York. This attack culminated in the death of one of the African-American men, who was forced onto a multi-lane highway and fatally struck by a car in his attempt to flee from the bat-wielding mob of young white men.

In addition to *amicus'* personal experience, the Office of the Kings County District Attorney has supported and promoted the prohibition against the racial use of peremptory challenges for more than a decade and has consistently urged that the prohibition be applied to both criminal defense counsel and prosecutors. *See, e.g.*, Brief for Kings County District Attorney as *Amicus Curiae*, *Batson v. Kentucky*, 476 U.S. 79 (1986); Brief for Respondent, *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded for reconsideration in light of Batson*, 478 U.S. 1001 (1986).

Thus, *amicus* has had years of experience with judicial prohibitions on the use of peremptory challenges by criminal defense counsel to exclude potential jurors on the basis of race, both at the trial level as the prosecutor in a racially-

charged case which received national media attention and, since January 1990, as a District Attorney responsible for overseeing several thousand trials each year in a multi-racial, multi-ethnic county. Based on that experience, *amicus* has observed that defense counsel frequently attempt to use the peremptory challenge to exclude potential jurors on the basis of race, particularly in the most racially volatile of cases. Such discrimination is equally widespread, equally threatening to constitutional values, and equally amenable to judicial control as was the discrimination by prosecutors banned by this Court in *Batson* and the discrimination by civil counsel banned in *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991). For these reasons, *amicus* urges the Court to hold that the ban applies not only to prosecutors and civil litigants, but also to criminal defendants.

SUMMARY OF ARGUMENT

The exercise of race-based peremptory challenges by criminal defendants and their attorneys represents the last vestige of officially-tolerated racial discrimination in the selection of jurors in this country. The time has arrived for such discrimination to be eliminated once and for all.

Numerous state courts have recognized that public confidence in the fairness of criminal proceedings is compromised by *any* discrimination in the courtroom. Acting pursuant to their state constitutions, these courts have ruled that criminal defendants have no greater license to violate the Equal Protection rights of prospective jurors than have prosecutors.

The federal Constitution also forbids criminal defendants from excluding prospective jurors from service on the basis of race. First, the exercise of peremptory challenges incontrovertibly constitutes state action. Peremptory challenges occur in a public courtroom, during the course of a public trial, and in the performance of a quintessentially governmental function: the provision of petit juries in criminal trials. Additionally, they are enforced by judges and work a deprivation

upon citizens whose appearance for jury service has been compelled by the State. Second, a prosecutor in a criminal case, by virtue of his or her duties and relationship with the challenged jurors, has standing to uphold the rights of these jurors to be free from invidious discrimination. Finally, a defendant's Sixth Amendment rights to a fair trial and the assistance of counsel do not include any subsidiary right to discriminate in the selection of a jury.

Accordingly, this Court should now hold that *Batson* applies with equal force to the prosecution and the defense.

POINT I

EXPERIENCE IN THE COURTS OF NEW YORK AND OTHER JURISDICTIONS HAS LED TO THE RECOGNITION THAT A RACE-BASED PEREMPTORY CHALLENGE, REGARDLESS OF WHO EXERCISES IT, HARMS NOT ONLY THE CHALLENGED JUROR, BUT THE ENTIRE COMMUNITY

During the early morning hours of December 20, 1986, three African-American men whose car had broken down near the Howard Beach section of Queens, New York, were chased by a mob of bat and stick-wielding white youths, screaming racial epithets. One of the African-Americans was pursued until he was forced onto a six-lane highway where he was struck by a car and killed. A second was severely beaten. The third managed to escape without injury. Public apprehension about the fairness of the investigation and prosecution led to the appointment of *amicus* as Special Prosecutor to replace the Queens County District Attorney. Nine white youths eventually were convicted for acts they committed during the Howard Beach incident.

During the first case to go to trial, the defense challenged for cause or peremptorily every African-American prospective juror. On the prosecutor's motion, defense counsel was ultimately required by the court to offer race-neutral reasons for

the final three peremptory challenges. One challenge was disallowed and the juror seated.

The three defendants convicted at this trial argued to the New York Supreme Court, Appellate Division, Second Department, that "when a defense lawyer reasonably believes that blacks-qua blacks (or for that matter whites qua whites or greens qua greens) are more likely to convict his client based upon specific race-related issues in a particular case, he must exercise whatever lawful means are available to him to strike such jurors from the panel." Brief for Appellant, *People v. Kern*, 149 A.D.2d 187, 545 N.Y.S.2d 4 (2d Dep't 1989). A defense attorney in that case publicly defended race-based peremptory challenges: "I want the best for an acquittal. And any lawyer who tells you otherwise is a damn liar." *See* Cheever, *Defense Jeers Ruling Denying Peremptories in Howard Beach*, Manhattan Lawyer, October 6-12, 1987, at 5, col. 4.

In affirming the convictions of these three defendants, the Appellate Division rightly rejected these assertions:

> [P]eremptory challenges exercised solely on the basis of race, whether it be by the prosecution or the defense, necessarily result in injury not only to the excluded juror but to the community-at-large and to society's confidence in and respect for our system of justice. . . . [T]he courts cannot permit such conduct; justice cannot remain blindfolded, but rather must proclaim and insist that the guarantee of equal protection against all forms of racial discrimination, particularly in our system of justice, be enforced.

Kern, 149 A.D.2d at 235, 545 N.Y.S.2d at 34.

The New York Court of Appeals subsequently affirmed the decision of the Appellate Division and, quoting *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986), wrote, in part:

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection proce-

> dures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.' By their application to restrict defense peremptory challenges, the People have asserted the rights both of excluded jurors and the community-at-large.

People v. Kern, 75 N.Y.2d 638, 654, 554 N.E.2d 1235, 1243-1244, 555 N.Y.S.2d 647, 655-56, *cert. denied*, 111 S.Ct. 77 (1990) (citations omitted).[1]

Unfortunately, the problem of discrimination in jury selection is not unique to the Howard Beach case. One prominent defense attorney in New York, identified as a member of the board of directors of the National Association of Criminal Defense Lawyers, has asserted that the Constitution gives defendants—and their attorneys—the right to be racist: "I'm not prejudiced, but if I want to be, it's perfectly legal. Now, tell me, how can a judge tell a defendant that he can't be prejudiced?" Cheever, *supra*, at 38, col. 3. In the instant case, the defendants told the Georgia Supreme Court that, since a notice about the crime had been circulated in the black community, they were entitled to challenge black jurors

1 Even before the New York State appellate courts had definitively ruled on the issue, every New York criminal trial judge to address the issue had ruled that *Batson* applied to defense counsel, basing his or her decision on state constitutional and common-law grounds, as well as the Fourteenth Amendment to the federal Constitution. *People v. Muriale*, 138 Misc.2d 1056, 1066, 526 N.Y.S.2d 367, 374 (Sup. Ct. Kings Co. 1988), *appealed on other grounds*, 159 A.D.2d 651, 553 N.Y.S.2d 39, (2nd Dep't), *lv. denied*, 76 N.Y.2d 740, 558 N.Y.S.2d 902, 557 N.E.2d 1198 (1990); *People v. Gary M.*, 138 Misc.2d 1081, 1089-90, 526 N.Y.S.2d 986, 994 (Sup. Ct. Kings Co. 1988); *People v. Davis*, 142 Misc.2d 881, 888-891, 537 N.Y.S.2d 430, 434-36 (Sup. Ct. Bronx Co. 1988); *People v. Piermont*, 143 Misc.2d 839, 842-44, 542 N.Y.S.2d 115, 117-18 (Westchester Co. Ct. 1989).

without asking them any *voir dire* questions about the impact of the notice on their individual fitness to serve. (J.A. 35-37).

In a recent case from Garland, Texas, the defendants, members of a group advocating white supremacy and anti-Semitism, were convicted of conspiracy to violate the civil rights of African-American, Hispanic, and Jewish citizens. The defendants unsuccessfully contended that "they were denied the right to a fair and impartial jury" by the trial court's refusal to require the Jewish prospective jurors to so identify themselves, and thus to facilitate the defendant's use of peremptory challenges against all prospective jurors who were Jewish. The Fifth Circuit Court of Appeals held that peremptory challenge limitations based on race "apply logically to the defendants in this case." *United States v. Greer*, 939 F.2d 1076, 1086, *reh'g en banc granted*, 1991 US App LEXIS 28441 (5th Cir. 1991).[2]

Treating the defense and the prosecution identically during jury selection does not cause unbalanced juries; it produces fair and impartial ones. As six state courts have recognized, the prohibition of race discrimination in jury selection must be extended to defense counsel to guarantee that potential jurors are neither excluded nor stigmatized in violation of their constitutional rights, and to preserve the impartiality, representativeness, and appearance of fairness in the criminal justice system.

Prior to this Court's decision in *Batson*, California, Massachusetts, and Florida recognized that the use of racially discriminatory peremptory challenges in criminal cases was forbidden to the defense, as well as to the prosecution. These states explicitly held that their State Constitutions forbade peremptory challenges by defendants for racial reasons.

The California Supreme Court, in *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), held that: "[T]he People no less than individual defendants are

2 The court also rejected the defendants' claim that they were entitled to challenge for cause every prospective juror who was African-American, Hispanic, or Jewish.

entitled to a trial by an impartial jury drawn from a representative cross-section of the community." 22 Cal.3d at 283 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 907 n.29. The court stated that a contrary holding would frustrate other essential public policy functions:

> [W]hen a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the ground of group bias alone.

Id.

In *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979), the Massachusetts Supreme Judicial Court reasoned that the Commonwealth had the right to try its case before "the tribunal which the Constitution regards as most likely to produce a fair result" and is, therefore, deemed "equally to be entitled to a representative jury, unimpaired by improper exercise of peremptory challenges by the defense." 377 Mass. at 489 n.35, 387 N.E.2d at 517 n.35.

In Florida, the State Supreme Court restricted the racial use of peremptory challenges by criminal defendants after two controversial trials involving white police officers accused of killing African-American citizens. In each case, the defense use of peremptory challenges against African-Americans produced an all white jury; the defendants were acquitted; and the acquittals sparked public outrage, and, in one case, riots. *See* Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 195-96 (1989). The court then ruled that defense counsel were not permitted to use peremptory challenges in a discriminatory way. *State v. Neil*, 457 So.2d 481 (Fla. 1984).

Since *Batson*, three more states, including New York, have held that neither the prosecution nor the defense may exercise peremptory challenges systematically to exclude members of a racial or ethnic group from service on a criminal petit jury.

In New Jersey, a superior court ruled that *Batson* applies to the defense as well as the prosecution:

> If the courts allow jurors to be excluded because of group bias, be it at the hands of the State or the defense, they would be willing participants in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it.

State v. Alvarado, 221 N.J. Super. 324, 328, 534 A.2d 440, 442 (Law Div. 1987).[3] *See also State v. Levinson*, 71 Haw. 492, 795 P.2d 845, 849 (1990).

The peremptory challenge has long acted as a basis for preserving the image and reality of fairness in jury selection. These courts have all properly recognized that a peremptory challenge which permits racial discrimination, regardless of which party uses it, harms not only the challenged jurors themselves, but the entire community.

POINT II

THE CONSTITUTION PROHIBITS CRIMINAL DEFENDANTS FROM EXCLUDING PROSPECTIVE JURORS FROM SERVICE ON THE BASIS OF RACE.

Public support for the criminal justice system has always depended not only on the system's ability to render justice,

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3 *Alvarado* was approvingly cited by the New Jersey Supreme Court in *State v. Watkins*, 114 N.J. 259, 553 A.2d 1344 (1989). In that case, in *dicta*, the court stated, "It may be that discrimination in the courtroom cannot be eradicated without incurring costs. If the cost is some constraint on counsel's otherwise unbridled freedom in selecting jurors, we believe that it is a price worth paying. The alternative, that counsel could exclude a potential juror merely because the juror is a member of a cognizable group, is unthinkable. A courthouse has no room for invidious discrimination." 114 N.J. at 267, 553 A.2d at 1348.

but also on its ability to project to the parties and to the public an unimpeachable image of fairness. In cases such as those discussed above, and, regrettably, in scores of other cases where the victim is of one race and the defendant is of another, racial tension often exists inside and outside the courtroom. The Howard Beach incident was but one of the recent, highly-publicized trials in the New York City area which raised issues of racial prejudice. Within the past two years, a group of young African-American men was convicted of beating and raping a white woman who was jogging in Central Park (*see* Sullivan, *Last Sentencing in Jogger Attack*, N.Y. Times, March 14, 1991, at B4, col. 1) and a young white man was convicted of shooting and killing a young African-American man in the Bensonhurst section of Brooklyn. *See* Glaberson, *Bensonhurst Case Ends, Satisfying Few*, N.Y. Times, March 14, 1991, at A1, col. 2.

The most critical and contentious issues affecting society as a whole increasingly seem to crystallize in the course of criminal trials, placing a burden on the justice system to be fair which far transcends the facts of any particular case. Even trials in which race is not an obvious factor may raise important questions about public safety, police-community relations, and the ability of the legal system to be color-blind.

The ability to project the image of fairness in the criminal justice system rests significantly with the jurors. It is the jurors who are asked to determine the guilt of a defendant. If jurors are selected in an unbiased and impartial manner, a fair trial is more likely and public confidence in the criminal justice system is maintained. If jurors are not selected in an unbiased and impartial manner, there can be no fair trial and public confidence in the criminal justice system is ravaged.

This Court has the responsibility and authority to ensure that equal justice is secured to all. This Court, therefore, should now follow those state and federal courts that have applied the *Batson* rule to criminal defendants and their attorneys. The actions of criminal defense attorneys, no less than the actions of prosecutors and civil counsel, constitute

state action, and prosecutors have standing to uphold the Equal Protection rights of excluded jurors. Finally, a criminal defendant's rights to a fair trial and the assistance of counsel cannot and do not include the subsidiary right to discriminate against prospective jurors on the basis of race or ethnicity.

A. A Criminal Defendant's Exercise of Peremptory Challenges Constitutes State Action.

In an unbroken line of cases, this Court has held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids any action attributable to the State which deprives persons of their right to participate as jurors by reason of their race. *See*, *e.g.*, *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991) (discrimination by private litigants in civil cases); *Batson*, 476 U.S. 79 (discrimination through prosecutor's peremptory challenges); *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970) (discrimination by jury commission in summoning jurors); *Ex parte Virginia*, 100 U.S. 339 (1880) (discrimination by trial judge); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (discriminatory statute). Each case represents another step in this Court's determined effort to remove all vestiges of racism from the selection of jurors.

Although the constitutional guarantee of equal protection does not apply to the actions of private entities, *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191 (1988), nevertheless "governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints." *Edmonson*, 111 S.Ct. at 2082; *see also Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Having held that prosecutors may not, consistent with the Fourteenth Amendment, exercise peremptory challenges solely on the basis of race, this Court should now extend its

holding to criminal defendants and their attorneys. There is simply nothing private about the selection of jurors or the use of peremptory challenges. These challenges are exercised not in private matters but during the course of a public trial in a public building; they are not constitutionally required but are merely a privilege extended to criminal defendants by statute or decisional law; they are afforded to criminal defendants not merely for their benefit but also to assist the state in fulfilling its inherent obligation to criminal defendants and the public to provide impartial juries; the victims of race-based peremptory challenges are exposed to this discrimination only because they have been compelled by the State to appear for jury service; and, finally, peremptory challenges are not self-executing but require judicial enforcement. Accordingly, the exercise of race-based peremptory challenges by criminal defendants and their attorneys must be considered state action violative of the Equal Protection Clause of the Fourteenth Amendment.

Whether private discrimination violates the Fourteenth Amendment can be resolved only by determining whether "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). In *Lugar*, this Court set forth a two-prong test for state action: "[f]irst, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the State . . . ; [s]econd, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.* at 937. A state action question can be resolved "[o]nly by sifting facts and weighing circumstances" so that the nature and extent of state involvement in the private conduct can be "attributed its true significance." *Id.* at 939, *quoting Burton v. Wilmington Parking Auth.*, 365 U.S. at 722.

In *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991), this Court, basing its decision on the two-part *Lugar*

framework, held that when private litigants in a civil lawsuit exercise peremptory challenges, their conduct is state action subject to the strictures of the Equal Protection Clause.

First, this Court concluded, peremptory challenges have their source in state authority. *Edmonson*, 111 S.Ct. at 2083. Unlike events which can occur independently of the State, peremptory challenges are available only because the State has provided for them. This Court has repeatedly said that peremptory challenges are not constitutionally required. *See, e.g., Gray v. Mississippi*, 481 U.S. 648, 663 (1987); *Batson*, 476 U.S. at 107 (Marshall, J., concurring); *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948). Indeed, the State could choose to forego them entirely. Thus, the use of peremptory challenges could not occur but for the fact that the State has created them.

Turning to the second prong of the *Lugar* test, this Court concluded that "a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges," (*Edmonson*, 111 S.Ct. at 2083) inasmuch as the litigant relies to a significant extent on governmental assistance and benefits, performs a traditional governmental function, and causes an injury to the excluded juror that is aggravated by the incidents of governmental authority. *Id.* at 2083-87.

As this Court recognized, the State not only provides the means for discrimination in jury selection, but also, public officials are themselves involved in the discriminatory process from beginning to end. Potential jurors are exposed to the possibility of discriminatory challenges because the State, with its full coercive power, summons them for jury service. Additionally, race-based challenges are used exclusively on state property, *i.e.*, in state courtrooms, during the course of a criminal trial, an official activity which itself constitutes state action. *See Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980) ("a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment"). As stated in *Edmonson*:

> [A] private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror . . . . By enforcing a discriminatory peremptory challenge, the court "has not only made itself party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination." In so doing, the government has "create[d] the legal framework governing the [challenged] conduct," and in a significant way has involved itself with invidious discrimination.

111 S.Ct. at 2084-85 (citations omitted).

Moreover, "[t]he peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor." *Id.* at 2085. Notwithstanding a criminal defendant's participation in the process, the Constitution imposes on the State alone the duty to provide petit juries for serious crimes. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968). Additionally, the Constitution imposes on the State alone the duty to provide impartial juries drawn from a fair cross-section of the community. *See, e.g., Taylor v. Louisiana*, 419 U.S. 522 (1975).

These constitutional obligations rest with the State not merely for the benefit of criminal defendants, but also to safeguard the State's interest in prosecutions "tried before the tribunal which the Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. 24, 36 (1965); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) ("process of juror selection is . . . a matter of importance, not simply to the adversaries but to the criminal justice system"). The State may not abandon its obligation to criminal defendants and the public alike to provide impartial juries. States may, of course, fashion different models for achieving this goal, *Hayes v. Missouri*, 120 U.S.

68, 70 (1887), as, for example, by permitting the participation of the parties through peremptory challenges, but ultimately, the government retains the inherent obligation to provide impartial juries. *Id.* Thus, when criminal defendants and their attorneys participate in the selection of a jury, they are performing an inherently governmental function and are, therefore, bound by the same constitutional constraints by which all state actors must abide.

Finally, as this Court recognized in *Edmonson*:

> [T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courtroom itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. . . . To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.

111 S.Ct. at 2087.

For the same reasons as set forth in *Edmonson*, a criminal defendant's exercise of peremptory challenges must be considered state action. To the same extent as in a civil trial, a criminal defendant's peremptory challenges depend upon statutes or decisional law and have no significance outside the courtroom; require for their effect the processes and formal authority of the court; result in the creation of a quintessential governmental body; and, if exercised in a discriminatory manner, result in an injury exacerbated by its occurrence within an official forum. No less than in the civil context, racial bias in the criminal trial, whether the product of prosecutorial or defense activity, "mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." *Id.*

Polk County v. Dodson, 454 U.S. 312 (1981), does not suggest a contrary result. In that case, a criminal defendant sought to sue his attorney for damages in connection with her

handling of the criminal defendant's appeal.[4] This Court ordered that the complaint against the attorney be dismissed because she had not acted under color of state law for the purposes of suit under 42 U.S.C. § 1983.[5] This Court emphasized that in her handling of the appeal, the attorney had not "exercis[ed] power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Id.* at 317-18, *quoting United States v. Classic*, 313 U.S. 299, 326 (1941). Rather, in prosecuting the defendant's appeal, the attorney stood in an adversarial relationship to the government. *Id.* at 322 n.13.

Significantly, however, this Court made clear in *Dodson* that a public defender may act under color of law for *some* purposes, *id.* at 324-25, and, moreover, has long recognized that state action determinations must be made only upon a close analysis of all relevant facts and circumstances. *Burton v. Wilmington Parking Auth.*, 365 U.S. at 722. Thus, a determination that a party is not a state actor in one context is not decisive on whether that party is a state actor in another context. Although a criminal defendant and his or her attorney of course stand in an adversarial relationship to the state in the endeavor to bring to light the circumstances of the crime and the identity of the criminal, the same is not the case in the selection of the jury. As stated in *Edmonson*:

> In the jury selection process, the government and private litigants work for the same end . . . . The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking

4 After determining that the defendant's claims on appeal would be frivolous, the attorney moved for permission to withdraw as counsel and for dismissal of the appeal, pursuant to a state rule of appellate procedure.

5 The "under color of state law" requirement for actions under § 1983 is identical to the "state action" requirement for other Fourteenth Amendment claims. *See Lugar*, 457 U.S. at 929.

> constitutional protections against discrimination by reason of race.

111 S.Ct. at 2086.

Moreover, unlike the public defender in *Dodson*, whose decisions concerning the handling of her client's appeal entailed no governmental involvement whatsoever, a defense attorney making peremptory challenges cannot accomplish his or her ends without the participation of the trial judge—who indisputably is a state actor. Peremptory challenges simply have no effect until courts enforce them and exclude the challenged jurors.[6] Thus, the joint activity of the defense attorney and the trial judge brings the attorney's conduct within the strictures of the Fourteenth Amendment. *Compare Lugar*, 457 U.S. at 941-42, *with Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) (private entity acting pursuant to state statute is not, without more, a state actor); *see also Shelley v. Kraemer*, 334 U.S. 1 (state courts cannot, consistent with the Fourteenth Amendment, enforce private acts of race discrimination); *Barrows v. Jackson*, 346 U.S. 249 (1953) (precluding state courts from awarding damages against property owners for violating racially restrictive covenants).

Whether in a civil case involving private litigants only, or in a criminal case pitting a defendant against the State, jury selection remains a state function and those to whom it is delegated engage in state action. Criminal defendants, no less than civil litigants, require the participation and assistance of the court to enforce their challenges and can expose potential jurors to the humiliation of discrimination only as a result of the jurors' having been summoned by the State.

Accordingly, this Court's decision in *Edmonson* dictates the conclusion that the exercise of peremptory challenges by

6 For example, N.Y. Crim. Pro. Law § 270.25(1) defines "peremptory challenge" and describes what action is necessary to effectuate the challenge. It provides: "A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, *the court* must exclude the person challenged from service." (emphasis supplied).

criminal defendants and their attorneys represents state action.

B. Prosecutors Have Standing to Assert the Equal Protection Rights of Excluded Jurors.

In a long line of cases, this Court has recognized a litigant's standing to assert the rights of third parties when three conditions are satisfied: a) injury-in-fact to the litigant; b) a close nexus between the litigant and the third parties whose constitutional rights are at stake; and c) serious obstacles to the assertion of the right by the third parties themselves. *See, e.g., Craig v. Boren*, 429 U.S. 190, 192-97 (1976) (beer sellers have standing to invoke their young male customers' equal protection rights to buy beer at the same age as women); *Singleton v. Wulff*, 428 U.S. 106, 111-18 (1976) (physicians have standing to assert the rights of their patients to abortion); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (private schools have standing to assert the rights of parents and students to choose private school education).

In *Powers v. Ohio*, 111 S.Ct. 1364 (1991), this Court held that a criminal defendant has standing to assert the Equal Protection rights of jurors excluded from service on account of their race. The defendant's injury was said to arise from the doubts cast on the integrity of the judicial process by racial discrimination:

> The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. . . . If the defendant has no right to object to the prosecutor's improper exclusion of jurors, . . . there arise legitimate doubts that the jury has been chosen by proper means. The composition of the trier of fact is called into question, and the irregularity may pervade all the proceedings that follow.

Id. at 1371-72. Moreover, this Court found that the "congruence of interests" between the criminal defendant and the excluded juror made it appropriate for the defendant to raise

the rights of the juror, *id.* at 1372; and that the barriers to a suit by an excluded juror were sufficiently daunting that "a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Id.* at 1373.[7] The prosecutor's standing to assert the Equal Protection rights of excluded jurors is no less apparent.

First, the prosecutor is injured in the performance of his or her professional and statutory obligations. The public prosecutor has an undeniable interest in conducting orderly, fair, and lawful criminal trials that command community confidence.[8] That interest is seriously impaired when juries are selected on the basis of race. Unconstitutional discrimination in jury selection may well impair the ability of a jury to engage in impartial fact finding. *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972). In addition, it undermines public confidence in the fairness of the criminal justice system, *see Batson*, 476 U.S. at 87, and impairs the prosecutor's ability to investigate and prosecute crimes and to obtain the cooperation of victims and witnesses. Indeed, excluded jurors may well believe the prosecutor is responsible for discrimination in jury selection, no matter who is in fact responsible, and may hold the prosecutor responsible for correcting the situation. Thus, the prosecutor clearly suffers injury-in-fact.

Moreover, the nexus between the prosecutor and the excluded juror is sufficiently close to assure vigorous advocacy of the juror's rights. The public prosecutor has an official duty to ensure that jury selection proceeds in a constitutional manner. That interest is virtually identical to

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7 In *Edmonson*, this Court, relying on *Powers*, held that private litigants in civil cases likewise have standing to assert the Equal Protection rights of excluded jurors. 111 S.Ct. at 2087-88.

8 In *Berger v. United States*, 295 U.S. 78, 88 (1935), this Court described the prosecutor as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is . . . that justice shall be done."

the interest of the excluded juror in avoiding unconstitutional exclusion from jury service.

Finally, as recognized in *Powers*, the victims of discrimination are ill-suited to vindicate their own rights. Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their selection or exclusion. Excluded jurors usually are ill-situated even to know, much less to allege and prove, which party to the criminal action was responsible for their exclusion and why. Their Equal Protection rights, therefore, can best be vindicated only if the prosecutor is permitted to challenge what appears to be discrimination in the defendant's exercise of peremptory challenges while that discrimination is occurring.

Accordingly, this Court should hold that prosecutors, no less than criminal defendants, have standing to assert the Equal Protection rights of excluded jurors.

C. The Rights to a Fair Trial and the Assistance of Counsel Do Not Include the Right to Discriminate Against Prospective Jurors on the Basis of Race.

In addition to urging rejection of these now-settled principles of state action and third-party standing, some criminal defendants have asserted a special right or privilege—apparently rooted in their Sixth Amendment rights to a jury trial and the assistance of counsel—to exercise peremptory challenges on the basis of race. No such right exists.

Any claim that the Sixth Amendment grants defendants the privilege to discriminate must fail. As this Court has repeatedly stated, there is simply no place for racism in the courtroom. "Because of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (citation omitted). This is true especially regarding the selection of jurors. "Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85.

Reliance on racial stereotypes and other purposeful discrimination in the selection of jurors is intolerable not only because it violates the constitutional rights of defendants; such discrimination also violates the rights of the prospective jurors themselves. *Powers*, 111 S.Ct. at 1370; *Edmonson*, 111 S.Ct. at 2087; *Carter*, 396 U.S. at 329. Moreover, this Court has recognized that our society pays an enormous price when the legal system tolerates racial bias. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a . . . jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose v. Mitchell*, 443 U.S. 545, 555-556 (1979). *See also Peters v. Kiff*, 407 U.S. at 502.

Preventing this harm may be even more important in those cases like Howard Beach and the Miami police shooting cases described above, wherein "race is implicated in the trial" and public confidence in the fairness of the process is critical. *Powers*, 111 S.Ct. at 1371. The benefits from eliminating all racism in the selection of jurors in every case extend well beyond the courtroom. "In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Batson*, 476 U.S. at 99.

Thus, defendants face a heavy burden in justifying their use of race-based peremptory challenges—the sole remaining instance of officially-sanctioned racism in the selection of jurors. That burden cannot be met.

First, this Court has repeatedly upheld limits on the Sixth Amendment rights of defendants, and on the actions of their attorneys to advance those rights, when other important interests were implicated. Just last term, a majority of this Court agreed that "a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press." *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2748 (1991) (O'Connor, J., concurring). "Law-

yers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of the system in regulating their speech *as well as their conduct*." *Id.* at 2744 (emphasis added). A prime concern in *Gentile* was the likelihood that a defense attorney's extrajudicial statements would implicate "the state's interest in fair trials." *Id.* at 2745.

The need to maintain the integrity and fairness of the process, which is a key reason for the ban on discrimination in jury selection, has served to limit defendants' Sixth Amendment rights in other contexts as well. In *Wheat v. United States*, 108 S.Ct. 1692, 1697 (1988), the Court affirmed the trial court's refusal to accept the defendant's waiver of the right to conflict-free counsel, because "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *See also*, *Nix v. Whiteside*, 475 U.S. 158, 173 (1986) (Sixth Amendment right to counsel "includes no right to have a lawyer who will cooperate with planned perjury."); *Press-Enterprise Co.*, 464 U.S. at 510 (First Amendment right of access to criminal proceedings limits defendants' ability to waive Sixth Amendment guarantee of public trial); *Faretta v. California*, 422 U.S. 806 (1975) (Sixth Amendment right to counsel does not include unfettered right to proceed *pro se*).

Likewise, the Court in *Singer v. United States*, 380 U.S. at 36, upheld the prosecution's objection to a defendant's waiver of the Sixth Amendment right to a jury trial, in part because "the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." In *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646 (1988), the Court reiterated that defendants had no absolute Sixth Amendment right to present evidence. Instead, the justice system could demand compliance with reasonable procedural and discovery rules designed to serve the "State's interest in the orderly conduct of a criminal trial." *Id.* at 653. "More is at stake

than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself." *Id.* at 656.

The paramount public interest in preventing racism in the criminal justice system is certainly as compelling and, therefore, must take precedence over a defendant's claim to be entitled to use racially-biased peremptory challenges in selecting a jury. The Sixth Amendment gives defendants no excuse to practice racism in the courtroom.[9]

Nor does the attorney-client relationship, as delineated in the Model Code of Professional Responsibility, Canon 7 (1980), confer upon criminal defendants the right to discriminate.[10] As stated by the Supreme Court of Hawaii:

> Defense counsel, of course, has a duty to represent his client zealously within the bounds of the law, but that duty to the client, is the same as to the adversary system of justice. Thus EC 7-19 states: "The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."

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9 *Holland v. Illinois*, 493 U.S. 474, 110 S. Ct. 803 (1990), which explained that discriminatory peremptory challenges were prohibited by the Fourteenth Amendment rather than the Sixth Amendment, furnishes no support for the view that the Sixth Amendment grants defendants a *right* to discriminate. The majority in *Holland* reiterated that "race-based exclusion is no more permissible at the individual petit jury stage than at the venire stage." 110 S.Ct. at 807; *see also* 110 S.Ct. at 811 (Kennedy, J., concurring):

> I write this separate concurrence to note that our disposition of the Sixth Amendment claim does not alter what I think to be the established rule, which is that the exclusion of a juror on the basis of race, whether or not by use of a peremptory challenge, is a violation of the juror's constitutional rights.

See also 110 S.Ct. at 828 (Stevens, J., dissenting) (any interest in racially-based peremptory challenges "rests on the assumption that a black juror may be presumed to be partial simply because he is black—an assumption that is impermissible since *Batson*.").

10 *See also* Model Rules of Professional Conduct, Rule 3.1 (1983).

> Unfortunately, there has grown up an impression, among some defense lawyers, that the mandate to represent a client zealously overrides the qualification "within the bounds of the law."
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> . . .
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> Here, respondent['s] counsel was . . . attempting [by excluding all women] to obtain what he hoped would be a partial, rather than an impartial jury. This is not zealous representation within the bounds of the law. It is the contrary.

State v. Levinson, 795 P.2d at 848-49.

In addition, the attorney-client privilege would not be violated by requiring criminal defendants or their attorneys to state the reasons for their challenges, when a *prima facie* case of discrimination is established. *Batson*, 476 U.S. at 96. The attorney-client privilege shields from disclosure communications between attorneys and their clients, and nothing else. It does not bar courts from requiring defendants and their attorneys to set forth facts or reasons in support of their requests for relief, even if those facts or reasons have previously been the subject of attorney-client communications. *See Upjohn v. United States*, 449 U.S. 383, 395-96 (1981); *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2d Cir. 1984). This requirement is hardly confined to jury selection and has never been thought to constitute an unwarranted invasion of the attorney-client privilege or to compromise the defendant's trial strategy. *See, e.g., Williams v. Florida*, 399 U.S. 78 (1970) (upholding notice-of-alibi statute). Indeed, criminal defendants or their attorneys must already set forth facts or reasons in support of their requests for cause challenges.

Second, the unequivocal constitutional prohibition against discrimination in jury selection surely takes precedence over the only right that is directly implicated by *Batson*: the statutory right to exercise peremptory challenges. *Gray v. Mississippi*, 481 U.S. at 663. This Court has repeatedly held that

defendants have no constitutional right to peremptory challenges:

> The right [of peremptory challenge] is in the nature of a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guarantees of "an impartial jury" and a fair trial.

Frazier, 335 U.S. at 505 n.11, *quoting Stilson v. United States*, 250 U.S. 583, 586 (1919); *see also Swain v. Alabama*, 380 U.S. 202, 219 (1965).[11]

While there is a "long and widely held belief that the peremptory challenge is a necessary part of trial by jury" (*Swain*, 380 U.S. at 219), the Court has permitted numerous restrictions on defendants' exercise of such challenges. *See Swain*, 380 U.S. at 243-44 (Goldberg, J., dissenting). "Indeed, the concept of a peremptory challenge as a totally free-wheeling right unconstrained by any procedural requirements is difficult to imagine." *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 2279 (1988). One such requirement that can and should restrict the peremptory challenge is the command of the Equal Protection Clause that there be no racial discrimination in jury selection.

As this Court has recently explained, peremptory challenges "are a means to achieve the end of an impartial jury." *Id.* at 2278. So long as the jurors who sit are impartial, the fact that the defendant could not use peremptory challenges as he or she wished "does not mean that the Sixth Amendment was violated." *Id.*; *see also Lockhart v. McCree*, 476 U.S. 162, 184 (1986); *McDonough Power Equipment, Inc. v.*

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11 In fact, the number of challenges varies widely by jurisdiction. *See* Hoeffner, *Defendant's Discriminatory Use of the Peremptory Challenge after Batson v. Kentucky*, 11 Crim. L. Rev. 349, 350 n.3 (1989). "In this country, the power of the legislature of a state to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury . . . . The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more." *Hayes*, 120 U.S. at 71.

Greenwood, 464 U.S. 548 (1984); *Smith v. Phillips*, 455 U.S. 209 (1982); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors").

Third, because a "person's race simply 'is unrelated to his fitness as a juror' " (*Batson*, 476 U.S. at 87) (citation omitted), preventing defendants from relying on the irrelevant and intolerable factor of race does not interfere in the least with their ability to select fair jurors. Jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race." *Cassell v. Texas*, 339 U.S. 282, 286 (1950).

Thus, "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury." *Swain*, 380 U.S. at 208; *see also Taylor v. Louisiana*, 419 U.S. at 538; *United States v. Hatchett*, 918 F.2d 631, 637 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 2839 (1991). Nor is a defendant entitled to use racial bias as a means of obtaining "a jury believed by defense counsel as likely to view the evidence in a particular way." *United States v. Devin*, 918 F.2d 280, 291 (1st Cir. 1990). Defendants can no more accomplish these prohibited ends by *excluding* qualified jurors for racial reasons, then by insisting on the *inclusion* of unqualified jurors of a particular race. The Constitution requires impartiality, not favoritism. It is to be remembered that such impartiality "requires, not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes*, 120 U.S. at 70, *cited in Batson*, 476 U.S. at 107 (Marshall, J., concurring).

Finally, *Batson* imposes critical, but hardly extensive or unwieldy, limits on the exercise of peremptory challenges. "[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a

test." *Edmonson*, 111 S.Ct. at 2088.[12] Defendants will still be able to use *voir dire*, cause challenges, and unbiased peremptories in order to obtain an impartial jury. *See Allen v. Hardy*, 478 U.S. 255 (1986). "Absent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory strikes for any reason, or no reason at all." *Hernandez v. New York*, 111 S.Ct. 1859, 1874 (1991) (O'Connor & Scalia, JJ., concurring). Defendants will only be prevented from relying on the biased stereotypes and racist assumptions that this Court has rightly condemned.

The experience in New York and other jurisdictions confirms this Court's prediction that these limits on the peremptory challenge will not "create serious administrative difficulties." *Batson*, 476 U.S. at 99. "Fears of increased costs and prolonged trials also appear exaggerated, especially since the minimal increases associated with the limitation's implementation are . . . a small price to pay for the elimination of a too tempting opportunity for discrimination that has been too long tolerated in our courts of law." Hoeffner, *supra*, at 368.

CONCLUSION

In *Batson*, this Court rejected the claim that the "unfettered exercise of the [peremptory] challenge is of vital importance to the criminal justice system." 476 U.S. at 98. The Court made it clear that the Equal Protection Clause guarantee against discrimination on the basis of race "would be

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12 Some experts cling to the view, despite its repeated rejection by this Court, that race alone should matter. *See e.g.*, Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 Harv. L. Rev. 808, 838 (1989). However, "[s]ocial scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting, Inc. v. F.C.C.*, 110 S.Ct. 2997, 3029 (1990) (O'Connor, Kennedy & Scalia, JJ., dissenting).

meaningless were we to approve the exclusion of jurors on the basis of such assumptions [about their fitness to serve], which arise solely from the juror's race." *Id.* at 97-98. Since then, this Court has held that racially-biased peremptory challenges are just as offensive, and unconstitutional, when exercised by the parties in a civil trial (*Edmonson*) or by the prosecution in any trial, regardless of the defendant's race (*Powers*). Discriminatory jury challenges are no more necessary or legitimate when used by a criminal defendant; the constitutional prohibition against racial discrimination in jury selection does not confront an invisible barrier around the defense table in a public courtroom, leaving the defendant free to invoke the assistance of the law and the judge to strike jurors on the basis of race. Prohibiting defense counsel from excluding prospective jurors on the basis of race will eradicate the last vestige of racial discrimination in the selection of jurors.

More than fifty years ago, Justice Black wrote that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940). No one seeking to practice racial discrimination should be permitted to enlist the justice system in that war.

Respectfully submitted,

CHARLES J. HYNES
District Attorney

JAY M. COHEN
Assistant District Attorney
Counsel of Record

MATTHEW S. GREENBERG
VICTOR BARALL
CAROL TEAGUE SCHWARTZKOPF
MARGARET ANTINORI
Assistant District Attorneys

Kings County District Attorney's Office
210 Joralemon Street
Brooklyn, New York 11201
(718) 802-2156

December 19, 1991 *Counsel for* Amicus Curiae